Supreme Court, U.S.
FILED
05146 8 MAY 15 2006
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

RONALD WARRUM, in his capacity
As Personal Representative of the Estate of
JOSEPH SAYYAH, Deceased
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Robert R. Faulkner
400 court Street
P.O. Box 4208
Evansville, IN 47724
(812) 464-3966
Counsel for Petitioner

TABLE OF APPENDICES

Appendix A. - Opinion of the United States Court of Appeals for the Seventh Circuit decided October 25, 2005..... 2

Appendix B – Order of the United States District Court for the Southern District of Indiana dated September 22, 2004 ..... 14.

Appendix C – Order of United States Court of Appeals for the Seventh Circuit denying rehearing dated February 14, 2006..... 20

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-3753
RONALD WARRUM, in his capacity as
Personal Representative of the Estate of
JOSEPH F.SAYYAH, Deceased,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana, Evansville
Division.
No. 02 C 92—Richard L. Young, Judge.

ARGUED APRIL11, 2005—DECIDED OCTOBER
25, 2005

Before POSNER, RIPPLE, and
SYKES, Circuit Judges.

SYKES, Circuit Judge. Ronald Warrum appeals the district court's dismissal of this wrongful death action brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq. Warrum, as personal representative of the estate of Joseph Sayyah, alleges that in 1998 Dr. Asif Ali, a physician at the Department of Veterans Affairs ("VA") clinic in Evansville, Indiana, failed to properly [2] diagnose

Sayyah's esophageal cancer and that the misdiagnosis caused Sayyah's death in 2002. The district court dismissed the action for failure to comply with the administrative exhaustion requirement of 28 U.S.C. § 2675(a), which prohibits the initiation of an action against the United States under the FTCA unless an administrative claim is first presented to the appropriate federal agency. Although Sayyah submitted a medical malpractice administrative claim to the VA after his cancer was diagnosed, a claim for wrongful death was never presented to the agency after Sayyah died. The district court concluded that because a wrongful death claim does not accrue for purposes of the FTCA until the date of death, the prior administrative claim for medical malpractice did not satisfy the exhaustion requirement of § 2675(a) for the wrongful death claim. We affirm.

I. Background

The complaint alleges that in September 1998 Sayyah was treated at the Evansville VA clinic by Dr. Ali, who failed to properly diagnose his medical condition. Sayyah was correctly diagnosed in March 1999 as suffering from Stage III cancer of the esophagus. On December 19, 2000, Sayyah filed an administrative tort claim notice with the VA, alleging that the doctors and staff at the Evansville VA clinic failed to timely diagnose his cancer, resulting in a decreased chance of favorable treatment. This claim was denied on November 27, 2001. Sayyah died on February 4, 2002. On May 22, 2002, Warrum, as personal representative of Sayyah's estate, brought this wrongful death action

against the United States under the FTCA, alleging that the misdiagnosis by Dr. Ali and his staff at the Evansville VA clinic resulted in Sayyah's death.

The government moved to dismiss based upon failure to comply with the administrative exhaustion requirements [3] of § 2675(a)—specifically, the failure to file an administrative claim following Sayyah's death and prior to initiating this FTCA suit for wrongful death. The district court granted the motion, concluding that Sayyah's administrative notice of claim for medical malpractice did not satisfy the administrative claim requirement for the wrongful death action. Relying on our decision in *Fisk v. United States*, 657 F.2d 167, 170 (7th Cir. 1981), the court held that because a cause of action for wrongful death under the FTCA does not accrue until the date of death, the earlier medical malpractice administrative claim did not suffice as an administrative claim for the wrongful death. Warrum appeals.

II. Discussion

The FTCA is a limited waiver of the sovereign immunity of the United States and imposes liability "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1); *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979); *Charlton v. United States*, 743 F.2d 557, 558 (7th Cir. 1984). Accordingly, we look to state law—here, Indiana—to determine the substantive nature of the

plaintiff's cause of action. *White v. United States*, 148 F.3d 787, 793 (7th Cir. 1998); *Fisk*, 657 F.2d at 170. However, the FTCA imposes its own procedural rules—including the administrative exhaustion provision at issue here.

The FTCA's administrative exhaustion requirement provides that no action may be brought against the United States unless the claimant first presents the claim to the appropriate federal agency:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss [4] of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, *unless the claimant shall have first presented the claim to the appropriate Federal agency* and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

28 U.S.C. § 2675(a) (emphasis added). The Supreme Court has noted that the purpose of the FTCA's exhaustion requirement is to facilitate the administrative evaluation of tort claims by the agency whose activity gave rise to the claim and permit settlement of meritorious claims more quickly and without litigation. *McNeil v. United States*, 508 U.S. 106, 112, n.7 (1993); see also *Kanar v. United States*, 118 F.3d 527, 531 (7th Cir. 1997). "The most natural reading of the statute indicates that Congress intended to require complete exhaustion of

Executive remedies before invocation of the judicial process." McNeil, 508 U.S. at 112.

Although Sayyah filed a medical malpractice administrative claim notice with the VA after his cancer was diagnosed, an administrative claim for wrongful death was never presented to the agency. Warrum argues that the malpractice administrative claim should suffice for the FTCA's exhaustion requirement for the wrongful death action because it is well known that death often results from cancer. The VA, he argues, had notice in 2000 of the claim related to Sayyah's cancer misdiagnosis and should have known that his death—and a wrongful death suit—might ensue. The government argues that under Indiana law a claim for wrongful death is separate and distinct from a personal injury claim for medical malpractice, and the federal rule is that a wrongful death claim under the FTCA does not accrue until the date of death. Thus, says the government, in a wrongful death case, [5] § 2675(a) requires the presentation of an dministrative claim *for the death* before a wrongful death suit under the FTCA may be initiated.

A straightforward reading of the statute supports the government's position: "[a]n action shall not be instituted upon a claim against the United States for money damages for . . . personal injury or death . . . unless the claimant *shall have first presented the claim* to the appropriate Federal agency. . . . " 28 U.S.C. § 2675(a) (emphasis added). This is an action on a claim against the United States for money damages for a

death, but it was not preceded by an administrative claim for a *death*.

Our case law on the FTCA's statute of limitations also supports the government's position. We addressed the question of wrongful death claim accrual under the FTCA in Fisk. There, the plaintiff was subjected to negligent medical treatment in 1950, but his death did not occur until complications from the malpractice surfaced nearly thirty years later. Id. at 169. The government argued (in contrast to the present case) that Fisk's wrongful death claim was time-barred by the FTCA's two-year statute of limitations because the wrongful death claim had accrued at the same time as Fisk's medical malpractice claim—in 1950. We disagreed.

We began our analysis in Fisk by referring to the general rule of wrongful death claim accrual under the FTCA: "in an 'ordinary' wrongful death action under the FTCA[,] the federal rule is that the cause of action accrues upon the date of death." *Id.* at 170. We then noted that in Indiana, a claim for wrongful death is independent and not derivative of the underlying claim for personal injury, and the occurrence of a death was an essential element of a wrongful death cause of action. Id. at 170-71. "[U]ntil the death of the plaintiff's decedent there can be no claim for wrongful death, because until that event occurs, the [6] damages the statute is intended to remedy have not been inflicted on the plaintiff." Id. at 171 (citing *Louisville, Evansville, & St. Louis R.R. v. Clarke*, 152 U.S. 230, 238 (1894)).

We noted in Fisk that "[t]he purpose of the [Indiana Wrongful Death] statute is not to compensate for the injury to the decedent, but rather to create a cause of action to provide a means by which the decedent's survivors may be compensated for the loss they have sustained by reason of the death." Id. at 170; see also *Reeder v. Harper*, 788 N.E.2d1236, 1242 (Ind. 2003). Thus, because Indiana treats a wrongful death claim as substantively distinct from the underlying personal injury claim, we held that a wrongful death claim stemming from medical malpractice does not accrue for purposes of the FTCA's statute of limitations until the date of death. Fisk, 657 F.2d at 170-72. "[T]he wrongful acts of 1950 gave rise to two separate claims: a personal injury claim of the decedent, to which the Government was exposed for two years after it accrued, . . . and a wrongful death claim of the decedent's survivors, to which the Government was exposed for two years after it accrued." Id. at 172. See also *Johnston v. United States*, 85 F.3d 217, 222 (5th Cir. 1996); but cf. *Chomic v. United States*, 377 F.3d 607 (6th Cir. 2004) (holding that in states with derivative rather than independent wrongful death causes of action, claim accrues when person knows of injury and cause).

Applying the reasoning of *Fisk* to the present case, we agree with the district court that the wrongful death claim at issue here did not accrue and could not have been presented to the VA until the date of Sayyah's death. As such, the earlier medical malpractice administrative claim did not suffice as a death "claim"

under § 2675(a). Warrum never presented an administrative claim to the VA for damages for Sayyah's death. Accordingly, this action was [7] properly dismissed for failure to comply with the FTCA's administrative exhaustion requirement.

This result comports with the exhaustion requirement's purpose of allowing the relevant government agency the opportunity to investigate and settle meritorious claims lodged against it. See *Romulus v. United States*, 160 F.3d 131, 132 (2d Cir. 1998) (per curiam) ("A claim must be specific enough to serve the purpose of the FTCA to enable the federal government to expedite the fair settlement of tort claims."); see also *Kanar*, 118 F.3d at 531; *Charlton*, 743 F.2d at 559-60. As we have discussed, under Indiana law, a wrongful death claim "is designed to compensate for the loss to the survivors caused by the decedent's death, and not the underlying injury." *Holmes v. ACandS, Inc.*, 709 N.E.2d 36, 39 (Ind. Ct. App. 1999). Such a claim necessarily involves causation and damages questions distinct from those at issue in a malpractice claim that does not involve a death. In order to meaningfully evaluate the extent of its liability in a death case, the federal agency must have notice of the death, not merely an assertion of medical malpractice. Indeed, in the case of a claim based on death, the applicable regulations allow the government to request the names of the decedent's survivors as well as the "[d]egree of support afforded by the decedent to each survivor dependent upon him for support at the time of his death." 28 C.F.R. § 14.4(a)(3)-(4). This information

bears directly on the damages potentially arising out of a wrongful death cause of action under Indiana law.

Warrum seeks to get around Fisk by invoking a change in Indiana law since Fisk was decided. In particular, he notes that Indiana law now requires wrongful death actions based on medical malpractice to be brought under Indiana's medical malpractice statutory scheme, which includes a statute of limitations that requires claims to be brought within two years of the act of medical negligence. [8] See *Hopster v. Burgeson*, 750 N.E.2d 841, 852-53 (Ind. Ct. App. 2001); *Frady v. Hedgcock*, 497 N.E.2d 620, 622 (Ind. Ct. App. 1986). Warrum argues this development means that in the medi cal malpractice context, Indiana law no longer recognizes wrongful death actions as independent claims. We disagree. The change in the applicable statute of limitations for wrongful death claims based upon medical malpractice did not alter the substantive nature of a wrongful death claim under Indiana law[1]. What was true at the time of Fisk is still true today: Indiana law regards a wrongful death claim as independent of a personal injury claim that might have been possessed by the decedent before death. See *Chamberlain v.*

---

[1] We note that there is some question as to whether Indiana's medical malpractice statute of limitations scheme violates the state constitution. See *Morrison v. Sadler*, 821 N.E.2d 15, 22 n.7 (Ind. App. 2005); *Ellenwine v. Fairly*, 818 N.E.2d 961, 969-70 (Ind. App. 2004). See generally Martin v. Ritchey, 711 N.E.2d 1273 (Ind. 1999).

Walpole, 822 N.E.2d 959, 963 (Ind. 2005) (holding that the Indiana Medical Malpractice Act did not create new claims for relief, but "merely requires that claims for medical malpractice that are otherwise recognized under tort law and applicable statutes be pursued through the procedures" of the Act).

In any event, as we specifically noted in *Fisk*, the issue "is not one of choice between conflicting [state] statutes of limitations or accrual dates, but rather one of ascertaining the intent of Congress in enacting the FTCA and its limitations period." *Fisk*, 657 F.2d at 171. Although this case concerns the FTCA's exhaustion requirement and not its limitations period, the point is the same: the change in Indiana's statute of limitations for medical malpractice death claims does not affect the administrative exhaustion requirement of § 2675(a). Because under *Fisk* the wrongful [9] death claim did not accrue until Sayyah's death in 2002, the presentation of Sayyah's malpractice administrative claim notice in 2000 did not satisfy the exhaustion requirement of § 2675(a) for purposes of this FTCA wrongful death action.

A final point: Warrum argues that the complaint can be read not just as a wrongful death action but also as a survival claim based on Indiana's "increased risk of harm" or "loss of chance" doctrine. This theory allows recovery against a defendant "whose negligence significantly increases the probability of the ultimate harm, even if the likelihood of incurring that injury was greater than fifty percent in the absence of the defendant's negligence." *Cahoon v. Cummings*, 734

N.E.2d 535, 539 (Ind. 2000). But the Indiana Supreme Court held in Cahoon that "a plaintiff cannot recover on both a wrongful death claim and a claim of an increased risk of harm caused by the same wrong." Id. at 544. Warrum concedes this, but argues that a survivor can bring an increased risk of harm claim if the death resulted from another cause. For instance, if the death resulted from a separate, unrelated cause—suppose the decedent were struck by a car—a plaintiff could pursue both causes of action because in that instance the wrongful death claim would not subsume the negligence claim for increased risk of harm. But "[i]f the alleged result of the defendant's acts that increase the risk of harm is death itself," then a separate claim based on increased risk of harm is unavailable. Id. Here, the complaint plainly alleges that the cancer misdiagnosis caused Sayyah's death; it cannot be construed to allege a cause of action based upon the increased risk of harm doctrine.

The judgment of the district court is AFFIRMED

.

A true Copy:
Teste:

_____

Clerk of the United States Court of
Appeals for the Seventh Circuit
USCA-02-C-0072—10-25-05

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISON

RONALD WARRUM, in his capacity as Personal Representative of the Estate of JOSEPH F. SAYYAH, Deceased, Plaintiff,	)
vs.	)
UNITED STATES OF AMERICA, Defendant.	)

ENTRY ON THE UNITED STATES OF AMERICA'S MOTION TO DISMISS AND ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

Before the court is the United States of America's ("government") Motion to Dismiss and Alternative Motion for Summary judgment. For the reasons set forth below, the Government's Motion to Dismiss is **GRANTED**.

I. Facts

1. The Department of Veterans Affairs received an administrative tort claim notice from Joseph Sayyah ("Mr. Sayyah") on December 22, 2000.

2. The basis of the claim in the administrative tort claim notice was "failure by the

doctors and medical staff at Evansville, Indiana VA Clinic to timely diagnose cancer of the esophagus." (*See* Standard Form ("SF") 95, Part 8).

3. The injury which formed the basis of the claim was "[f]ailure to timely diagnose cancer of the esophagus leading to a decreased chance of favorable treatment of the claimant's cancer.) (*See* SF 95, Part 10).

4. Such claim was denied on November 27, 2001. (Affidavit of John Houff ("Houff Aff." Aff., ¶ 5).

5. The Department of Veterans Affairs has not received an administrative tort claim notice asserting a claim in connection with the death of Mr. Sayyah. (Houff Aff., ¶ 6).

6. Mr. Sayyah died on February 4, 2002. (Houff Aff., ¶ 7).

7. The Complaint filed in this case is brought by Ronald Warrum, in his capacity as personal representative of the estate of Joseph F. Sayyah, deceased ("Plaintiff"). (Complaint, ¶ 2).

II. Discussion

The Government's motion to dismiss alleges that the court does not have subject matter jurisdiction over this case due to Plaintiff's failure to comply with the notice requirements of the Federal Tort Claims Act ("FTCA"). A motion to dismiss challenging the court's jurisdiction is filed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Unlike a motion to dismiss filed pursuant to Rule 12(b)(1), a Rule 12(b)(1) motion may include matters outside of the pleadings, *English v. Comwell,* 10 F.3d 434, 437 (7th

Cir. 1993). The court will therefore treat this motion as one to dismiss.

Suits under the FTCA may only be brought under terms and conditions strictly prescribed by Congress. *McNeil v. United States,* 508 U.S. 106, 113 (1993). In *McNeil,* the Supreme Court held that: "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.* at 113 (citing *Mohasco Corp. v. Silver*, 447 807, 826 (1980)).

The FTCA provides in relevant part:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property of personal injury...caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

28 U.S.C. § 2675(a). The unambiguous language of the FTCA clearly requires a claimant to first file with the appropriate federal agency before legal action can

be instituted. 28 U.S.C. § 2675(a), *McNeil*, 508 U.S. 106 (1983); *Richardson v. United States*, 831 F.Supp. 657, 661 (N.D. Ind. 1993); *Miller v. United States Postal Service*, 815 F.Supp 1195, 1201 (S.D. Ind. 1993). The underlying purpose of Section 2675(a) is to allow the administrative agency to settle meritorious cases more quickly without the need for filing suit and before the costs of litigation. *McNeil*, 508 U.S. at 112 n.7. In *McNeil*, the Supreme Court noted that "[t]he interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command." *Id.* at 112.

In this case, it is undisputed that Plaintiff did not give notice to the Department of Veterans Affairs of the wrongful death claim that is now asserted in the Complaint. The fact that Mr. Sayyah gave notice of a medical malpractice claim prior to his death does not serve to save the Plaintiff's claim, because a claim for wrongful death dos not accrue for purposes of the FTCA until the date of death. *See Fisk v. United States,* 657 F.2d 167, 173 (7th Cir. 1981) ("the federal rule in wrongful death actions brought under the Federal Tort Claims Act is that the cause of action cannot accrue until the wrongful death occurs."). As Plaintiff's wrongful death claim had not accrued at the time of the filing of the administrative tort claim notice, it could have been "presented" to the agency by the filing of the administrative tort claim notice. Plaintiff's claim must therefore be dismissed.

Plaintiff asserts that his Complaint also states a claim under the Indiana Survival Statute, Ind. Code §

34-9-3-1, *et seq.*[2] under the "loss of chance" or "increased risk of harm" doctrine. This doctrine applies when a plaintiff's chances for long-tem survival are allegedly substantially decreased due to the negligence of the defendant. *Cahoon v. Cummings*, 734 N.E.2d 535, 544 (Ind. 2000); *Alexander & Alexander v. Scheid & Orthopaedics Indianapolis, Inc.*, 726 N.E.2d 272, 281-282 (Ind. 2000). However, a personal representative may only bring a claim for increased risk of harm if the plaintiff's death was the result of a cause of death. *Cahoon*, 734 N.E.2d at 544 ("It is possible, however, for a representative to bring a

---

[2] The Indiana Survival Statute, provides as follows:

(a) If an individual who is entitled or liable in a cause of action dies, the cause of action survives and may be brought by or against the representative of the deceased party except actions for:

****

(6) personal injuries to the deceased party.

In addition, Indiana Code § 34-93-4, which applies when a person "receives personal injuries caused by the wrongful act or omission of another" and subsequently dies from causes other than those personal injuries, provides that:

> The personal representative of the decedent who injured may maintain an action against the wrongdoer to
> Recover all damages resulting before the date of death from those injuries that the decedent would have
> been entitled to recover had the decedent lived. The damages inure to the exclusive benefit of the
> decedent's estate.

Ind. Code § 34-9-3-4.

survival action on an increased risk of harm claim even where the plaintiff has died, if the death resulted from another cause."). In this case, Plaintiff's claim against the Government is that the death of Mr. Sayyah was caused by the Government's negligence. Thus, Plaintiff's claim under the Indiana Survival Statute is not preserved.

III. Conclusion

Because Plaintiff failed to give the Government notice of this wrongful death claim under FTCA, Plaintiff's wrongful death claim must be dismissed. In addition, to the extent Plaintiff's Complaint states a claim under the Indiana Survival Statute, such claim must also be dismissed, since the Complaint alleges that the cause of Mr. Sayyah's death was the Government's negligence, and not some other cause. The Government's Motion to Dismiss is therefore **GRANTED**.

SO ORDERED this 17th day of September 2004.

/s/

Richard L. Young

RICHARD L. YOUNG, JUDGE

United States District Court

Southern District of Indiana

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinios 60604

February 14, 2006

Before

Hon. RICHARD A. POSNER, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DIANE S. SYKES, Circuit Judge.

No. 04-3753
RONALD WARRUM, in his capacity as
Personal Representative of the Estate of
JOSEPH F.SAYYAH, Deceased,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana, Evansville
Division.
No. 02 C 92—Richard L. Young, Judge.

ORDER

On consideration of plaintiff-appellant's petition for rehearing and petition for rehearing en

banc, no judge in active service has requested a vote on the petition for rehearing en banc and all the judges on the original panel have voted to deny rehearing. It is therefore ordered that the petition for rehearing and rehearing en banc is DENIED.

Respectfully submitted,

Robert R. Faulkner
Counsel of Record
400 court Street
P.O. Box 4208
Evansville, IN 47724
(812) 464-3966
Counsel for Petitioner